

STATE OF MICHIGAN  
IN THE SUPREME COURT

PINE OAKS, LLC

Plaintiff/Appellant,

v.

Supreme Court Case No. \_\_\_\_\_  
Court of Appeals Case No. 249163  
Circuit Court Case No. 03-45297-AV  
District Court Case No. HU-02-2650-LT

DANNY DEVRIES & JAYNE DEVRIES

Defendants/Appellees.

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DEFENDANTS/APPELLEES' RESPONSE TO PLAINTIFF/APPELLANT'S  
APPLICATION FOR LEAVE TO APPEAL

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## STATEMENT OF QUESTIONS PRESENTED

I. Should evidence of inequities in the foreclosure sale, including the inadequate sale price, the loss of equity held by the homeowners, and their arrangements to redeem, have been admitted and considered by the District Court?

Plaintiff-Appellant answers: No.

Defendants-Appellees answer: Yes.

II. Was failure of the mortgagee to follow contractual foreclosure requirements a defect in procedures that should have been considered by the District Court?

Plaintiff-Appellant answers: No.

Defendants-Appellees answer: Yes.

III. Was evidence that the Devries became the mortgagors by novation and by actions of the Parties admissible to determine if statutory notice was correctly given?

Plaintiff-Appellant answers: No.

Defendants-Appellees answer: Yes.

IV. Once cognizable title issues are raised in a summary proceeding for eviction, must the District Court either decide title for purposes of determining possession or transfer the matter to Circuit Court to quiet title?

Plaintiff-Appellant answers: No.

Defendants-Appellees answer: Yes.

## STATEMENT OF FACTS

Defendants Danny and Jayne DeVries appeal the order evicting them from their residence, which followed foreclosure of their mortgage.

On August 23, 2001, a foreclosure sale of the DeVries residence was held by a deputy sheriff, acting on behalf of their mortgagee, Comerica Bank. According to the notice of foreclosure tacked to their house, the outstanding balance of the mortgage was \$4,439.12. (Plaintiff's Tr. Ex. 4) The DeVries had paid regularly on this mortgage throughout the twenty years that they lived in the house, but in 2001, they fell several payments behind. (Trial Tr., 11/25/02, p. 101) Plaintiff Pine Oaks LLC purchased the DeVries' home at the foreclosure sale for \$5,374.22.

According to pleadings filed in this eviction action, the DeVries made arrangements to redeem their property before the redemption period ran, by deeding the property to a financing company, which then would resell it to them on land contract. The title company handling this transaction paid the redemption amount to the wrong company, however, and so the redemption was never completed. (Plaintiffs' Motion to Transfer Action from District Court to Circuit Court and/or Stay Proceedings)

Pine Oaks LLC filed its eviction action on August 29, 2002. In their Answer and Affirmative Defenses, the DeVries challenged the validity of the foreclosure and the foreclosure process. Included in the issues raised were the following:

- 1) a contention that the notice of foreclosure was defective because it named only the original mortgagor, Jack A. Poll, who had sold the property to the DeVries, and did not name the DeVries;

- 2) an allegation that the notice of foreclosure was void due to the failure of the mortgagee bank to comply with notice requirements in the mortgage contract prior to invoking the contractual power of sale, and
- 3) an affirmative defense based on the inadequacy of the sale price at foreclosure, in comparison to the value of the property.

In October 2001, the DeVries filed an action in the 20<sup>th</sup> Circuit Court to quiet title and for damages, naming the companies with which they had contracted to pay the redemption amount -- Enterprise Capital Investments and Enterprise Mortgage Corporation -- as well as Comerica Bank, Washington Mutual, and Republic Bank, to whom Enterprise had given a new mortgage on the property after its attempted redemption. (Circuit Court Complaint attached to Plaintiffs' Motion to Transfer) On October 21, the DeVries filed a counterclaim to quiet title in the District Court eviction action, seeking to set aside the foreclosure sale. On November 6, the DeVries filed a motion for leave to file a counterclaim in the District Court action, along with a supporting brief. Finally, the DeVries filed a motion in the District Court to remove the case to Circuit Court for consolidation with the quiet title action filed there, or, alternatively, to stay the eviction pending determination of ownership issues by the Circuit Court. The motion also sought discovery if the case remained in District Court and was not stayed.

The District Court heard the motions to amend and to remove on November 11. The Court denied the motion to remove, and ruled that discovery could be done, but had to be concluded in time for the scheduled jury trial on November 25. The Court also



denied the motion to amend to state a counterclaim to quiet title. (Tr., 11/11/02, p. 19, 28) A written order was entered on December 2.

Prior to trial, Plaintiff filed a motion in limine, seeking to exclude all evidence regarding three issues raised by Defendants: 1) the appraised value of the property, and how it compared to the foreclosure sale price; 2) attempts to redeem the property after foreclosure sale; and 3) failures to comply with contractual notice requirements prior to accelerating the balance on the mortgage. In response, Defendants filed a Statement of Law on the relevance of the contractual notice requirements.

The Court heard argument on the motion in limine on November 19, the same day on which the jury was selected for trial, but did not decide it. The argument was concluded on the trial date, November 25. Defendants made an offer of proof regarding the failure of the mortgage foreclosure process to follow specific mortgage contract requirements for notice of intent to accelerate, notice of the right to cure the breach, and notice of the right to reinstate or bring court action to challenge the acceleration. Defendants also made an offer to prove that the value of the property at the time of the foreclosure sale was approximately \$116,000. Defendants contended that the combination of the gross inadequacy of the sale price with irregularities in notice and the failure to return the excess money in the foreclosure sale constituted a defense to eviction and a basis to hold the foreclosure sale invalid. Finally, Defendants argued that during the jury selection, Plaintiff had opened the door to proof of the attempt to redeem, by suggesting that the Defendants had lived in the property for many months following the foreclosure "for free". (Trial Tr., 11/25/02, pp. 3-7)

The Court granted the Plaintiff's motion, excluding any evidence regarding the appraised value of the property, failure to follow contractual notice requirements in the foreclosure, and any attempts to redeem.

The first witness for Plaintiff was the deputy sheriff who handled the foreclosure, Steven Cotton. Defendants objected to part of Exhibit 4, Cotton's affidavit and notice, which included the affidavit of the newspaper that published the notice. Defendants argued that it could only be admitted to show that an affidavit was recorded, not that publication was made as asserted. The Court overruled this objection, entering the exhibit for all purposes. (Trial Tr., 11/25/02, p. 33) Cotton testified that he tacked the published notice to the house, and that the foreclosure sale resulted in purchase by Pine Oaks for \$5,374.22. Cotton could not verify, however, that the publication attested to in the affidavit actually had taken place. (Trial Tr., 11/25/02, p. 44)

James Batchelor, attorney for the foreclosing bank, testified that the notice of foreclosure filed by his firm in this case listed only Jack A. Poll as mortgagor. Over objection, he testified that, when there is what the bank considers to be an "informal assignment" of a mortgage, his firm lists only the original mortgagor on the notice of foreclosure, a practice that he believes complies with the law. Batchelor also testified that the original mortgagee, Grand Rapids Mutual Federal Savings & Loan, had merged with Comerica Bank. (Trial Tr., 11/25/02, p. 50-55) On cross examination, Batchelor testified that he had no way of knowing whether an unrecorded assumption of mortgage agreement, assigning the mortgage from Poll to the DeVries and agreed to by the bank, existed in Comerica Bank files, since his firm probably did not receive the whole bank file. (Trial Tr., 11/25/02, p. 59)

Lynn Hunt, of Pine Oaks, testified that she bid on behalf of Pine Oaks at the foreclosure sale and received the sheriff's deed. (Trial Tr., 11/25/02, pp. 62-63) After her testimony, Plaintiff rested.

Pine Oaks moved to exclude any testimony concerning an agreement between the bank and the DeVries for the DeVries to assume Poll's mortgage.<sup>1</sup> Defendants pointed out that the closing statement for the sale of the property to the DeVries included a \$50 payment labeled a "mortgage transfer fee". Defendants' counsel said that Defendants would testify that they paid this money to the bank, and believed that they signed papers to make them the official mortgagors instead of Mr. Poll. Defendants argued that this evidence would show that notice of foreclosure did not list the proper mortgagor. The Court ruled, however, that because Defendants were unable to produce a formal written assumption document, any reference to a mortgage transfer fee and any testimony about documents transferring the mortgage would be excluded. (Trial Tr., 11/25/02, pp. 70-77)

The Court also excluded various exhibits offered by Defendants to show that all parties treated the mortgage as transferred from Poll to DeVries. These included the purchase agreement between Poll and the DeVries, letters and statements from the mortgagee and mortgage servicers addressed to the DeVries alone as mortgagors and including only the DeVries' social security number under "Mortgagor SSN". The Court ruled that, in the absence of a formal assumption document, evidence that the bank or its servicing agents treated the DeVries as the mortgagors would not affect statutory foreclosure procedures, or require any changes in the statutory notice. The Court did

allow the DeVries to testify about receiving mortgage bills. (Trial Tr., 11/25/02, pp. 88-89, 95)

Jack Poll testified that he sold his house to the DeVries in the fall of 1979. The DeVries were to assume the mortgage as part of the sale. In the succeeding 22 years, the bank or its agents regarding the mortgage never contacted Poll. He received no bills, no statements and no tax coupons showing deductible mortgage interest. He received no notice of the foreclosure, and did not know that it had happened until Defendants contacted him about the eviction trial. (Trial Tr., 11/25/02, pp. 97-98)

Danny DeVries testified that he and his wife bought the house at 7781 Hearthway and had lived there for 23 years. During that time, he received invoices and bill statements regarding the mortgage from the mortgage company, and made mortgage payments. Danny DeVries' social security number was on bill statements, and Jack Poll's name did not appear. (Trial Tr., 11/25/02, pp. 99-102)

After Defendants rested, and before closing argument, the Court put on the record its ruling on two jury instructions requested by the DeVries. The Court excluded a proposed instruction that "The name of the person obligated to pay the mortgage must be listed on the notice of foreclosure." The Court also denied Defendants' request to instruct the jury that "The Defendants are considered the borrower if you find that they became responsible for paying the mortgage in place of the original borrower." (Trial Tr., 11/25/02, pp. 109-110; Defendants' Proposed Jury Instructions, pp. 17-18)

After deliberations, the jury found in favor of the Plaintiff. The District Court entered judgment for the Plaintiff on January 7, 2003. Defendants appealed, and the

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<sup>1</sup> Throughout its Application for Leave to Appeal, Plaintiff fails to mention the evidence that Defendants offered that was excluded by the District Court, as well as the offers of

Circuit Court affirmed the District Court decision by order entered on June 6, 2003; Defendants received a copy of the Circuit Court's order on June 9, 2003. Defendants filed an application for leave to appeal from the Circuit Court's order; the Court of Appeals granted leave on August 1, 2003, and reversed the Circuit Court and remanded the case in an unpublished opinion dated December 9, 2004.

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proof that were made.

## ARGUMENT

This case tests the ability of homeowners to question the foreclosure of their homes in the first and only court proceeding that takes place in most foreclosures – the eviction proceeding following foreclosure sale. Michigan law permits homeowners to raise flaws in the foreclosure procedures in the subsequent eviction case. In this case, however, the District Court narrowly defined the issues that could be raised about the foreclosure. In doing so, the Court allowed a gross injustice to occur to homeowners who had faithfully paid their mortgage for 20 years and had little left to pay, who were not properly notified about the acceleration of their mortgage debt and the foreclosure, and who acted to redeem their mortgage, only to be robbed of their money and their opportunity by third parties. Defendants should have had the opportunity to raise clear defects in the foreclosure of their home, and to notify the trier of fact of the equities concerning the house's value. As recognized by the Court of Appeals, a full inquiry should have been available in District Court, or the matter should have been removed to Circuit Court in consolidation with a broader inquiry in that Court.

Plaintiff seeks to eliminate meaningful review of self-help mortgage foreclosures in subsequent court proceedings, limiting inquiry to the narrowest of procedural issues. The Court of Appeals correctly held that Michigan law provides a forum to determine if irregularities in the foreclosure combined with strong equities favoring relief require that a mortgage foreclosure sale be set aside.

- I. Evidence of inequities in the foreclosure sale, including the inadequate sale price, the loss of equity held by the homeowners, and their arrangements to redeem, should have been admitted and considered by the District Court.**

Plaintiff contests the Court of Appeals decision that equitable issues questioning the fairness of a mortgage foreclosure, which are properly raised, must be considered in summary proceedings after foreclosure sale. Plaintiff's argument essentially is that the only significant interests that must be considered and protected at this juncture are those of the buyer at the foreclosure sale, who may not know of the equitable issues surrounding the sale.

Michigan court rulings have never been so narrow, and have never so completely ignored the interests of those who stand to lose property (a home in this and many other cases) and equity built up over years.

The DeVries were not dilatory in attempting to redeem the property -- in August 2001, the month in which the foreclosure sale was held, Mr. and Mrs. DeVries executed financing documents to have ECI and Enterprise pay the redemption amount due on the Residence. (Defendants' Proposed Counterclaim to Quiet Title, p. 2, para 9) The DeVries received a notice of discharge of the mortgage from Washington Mutual dated April 22, 2002, and a certificate of discharge of the mortgage from Comerica Bank through its agent Washington Mutual, recorded on March 11, 2002. (Defendants' Proposed Ex. I, pp. 1-2) In granting Plaintiff's Motion in Limine, the District Court excluded as irrelevant any evidence of the attempt at redemption. (Plaintiff's Motion in Limine, p. 2, para. 9; Motion Hearing Tr., 11/25/02, p. 13)

Prior to and at trial, Defendants sought the admission of evidence of the appraised value of the property to show the vast disparity with the amount bid at foreclosure sale, the attempt of Defendants to redeem including timely closing on a transaction to redeem, failure of the mortgagee to follow procedures required in the

mortgage before foreclosure, and evidence to support their contention they became the mortgagors of the property, were treated as such by holders of the mortgage, and thus should have been treated as mortgagors in the foreclosure. Each of these offers was rejected on motion of the Plaintiff.

Failure to consider the combination of an unjust sale price depriving the mortgagor of painfully accumulated equity and procedural irregularities in the foreclosure contravenes a long line of Michigan precedent. Michigan law on this issue was summarized by the Eastern District of Michigan federal court in *Gottlieb v McArdle*, 580 F Supp 1523, 1525-1526 (ED Mich 1984):

In order for such a [foreclosure] sale to be set aside, there must be both a grossly inadequate sale price and some other defect such as fraud, mistake, unfairness, or irregularity. See *Carlisle v Dunlap*, 203 Mich 602, 169 NW 936 (1918).

This holding of *Carlisle v Dunlap* has been cited repeatedly by succeeding Michigan cases. See, e.g., *Greenberg v Kaplan*, 277 Mich 1, 8, 268 NW 788 (1936); see also *Solomon v. Neubrecht*, 300 Mich 177, 179, 1 NW2d 501, 502, (Mich. Jan 05, 1942) (citing *Greenberg*).

Plaintiff relies on a faulty reading of *Reid v Rylander*, 270 Mich 263, 258 NW2d 630 (1945), to assert that equitable concerns and defects in contract-required procedures cannot be considered. Reid addressed the grounds then available before a circuit court commissioner in a summary proceeding. The grounds that could be used to defend in that forum were limited (though not as limited as the plaintiff suggests, see Argument II below), and there was no equitable jurisdiction. The Court made clear, however, that under procedures then in effect, a full equitable consideration of the foreclosure and the mortgage itself was available in a different type of proceeding.



Had the defendants filed a bill to set aside the foreclosure and cancel the mortgage, then, under *Windisch v Mortgage Security Corp. of America*, 254 Mich 492, 236 NW 880, no relief could have been obtained without offer to do equity by tender of repayment of money actually received incident to the loan and interest at the legal rate thereon.

*Id.*, at 269-270. If the proper action had been filed, and tender of repayment made, an equitable challenge to the foreclosure could have been made and equitable relief given.

Since *Reid*, the Revised Judicature Act gave the district court jurisdiction to hear equitable claims affecting possessory rights in summary proceedings. The Court of Appeals in *Manufacturers Hanover Mortgage Company v Snell*, 142 Mich App 548, 370 NW2d 401 (1985), explained the impact of this change in terms of the right of mortgagors to defend themselves articulated in *Reid*:

The Supreme Court has long held that the mortgagor may hold over after foreclosure by advertisement and test the validity of the sale in the summary proceeding. *Reid v. Rylander*, 270 Mich. 263, 267, 258 N.W. 630 (1935); *Gage v. Sanborn*, 106 Mich. 269, 279, 64 N.W. 32 (1895). Otherwise, the typical mortgagor who faces an invalid foreclosure would be without remedy, being without the financial means to pursue the alternate course of filing an independent action to restrain or set aside the sale. *Reid, supra*, 270 Mich. p. 267, 258 N.W. 630; see also, 16 Michigan Law and Practice, Mortgages, § 174, pp. 438-439. The mortgagor may raise whatever defenses are available in a summary eviction proceeding. M.C.L. § 600.5714; M.S.A. § 27A.5714; *Federal National Mortgage Ass'n v. Wingate*, 404 Mich. 661, 676 fn. 5, 273 N.W.2d 456 (1979). *The district court has jurisdiction to hear and determine equitable claims and defenses involving the mortgagor's interest in the property. M.C.L. § 600.8302(3); M.S.A. § 27A.8302(3); DCR 754.7(b)(1).*

*Id.*, at 553-554.

Similarly, in *Goldman v Fairbanks Capital Corp*, No. 5:03-cv-09, slip op. at 15 n2 (WD Mich March 11, 2003) (attached as Appendix B), the Federal District Court observed that Michigan's Revised Judicature Act – enacted subsequent to the decision in

*Reid v Rylander* – allows parties in summary possession proceedings to present equitable claims and defenses in summary proceedings for possession:

In the *Reid* decision, the Michigan Supreme Court indicated that challenges to the mortgage instrument itself, and other claims arising from facts outside the record, could not be litigated in summary possession proceedings. 258 N.W. at 631. Since the time of that 1935 decision, however, the Michigan Legislature has passed the Revised Judicature Act of 1961, significantly expanding the scope of summary possession proceedings and granting the state district courts jurisdiction to hear equitable claims arising in such cases. Mich Comp. Laws § 600.8302(3).

Plaintiff erroneously argues that the Revised Judicature Act did not affect the analysis in *Reid*, since the District Court had not been created when *Reid* was decided, and the Circuit Courts had equitable jurisdiction. However, summary proceedings at the time of *Reid* were held before the Circuit Court *Commissioner*, who had *no* equitable jurisdiction. See, e.g., *Hafeli Bros. Corporation v Bon*, 273 Mich 525, 263 NW 733 (1935). In *Hafeli Bros*, the Supreme Court held that the defendant could not assert equitable rights under an option to purchase in defense of a summary proceeding, either before the Circuit Court Commissioner or on appeal to the Circuit Court judge, since such a case had to be brought in a court of equity. The holding in *Reid* is similarly dependant on the jurisdictional limits of courts at the time, now altered by the Revised Judicature Act.

Under current Michigan law, the Court of Appeals was clearly correct in holding that the District Court had the power and responsibility to examine equitable issues surrounding the mortgage foreclosure sale in the summary proceeding.

**II. Failure of the mortgagee to follow contractual foreclosure requirements was a defect in procedures that should have been considered by the District Court.**

The Court of Appeals correctly recognized that under Michigan caselaw, failure to comply with contractual requirements governing foreclosure renders a foreclosure sale voidable, and that failure to properly invoke the power of sale is a defense to eviction proceedings.

***A. Failure To Properly Invoke The Power Of Sale Provisions Of The Mortgage Is A Fatal Defect In A Foreclosure, Making The Foreclosure Sale Voidable***

The statutory procedures of foreclosure by advertisement apply only when there is a valid power of sale. "The theory underlying Michigan's foreclosure by advertisement scheme is that the provisions of the foreclosure by advertisement statute, MCL 600.3201 et seq. . . . become a part of the contract between the mortgagor and the mortgagee." *Manufacturers Hanover v Snell*, 142 Mich App 548, 553; 370 NW2d 401 (1985) Thus, in *Reid v Rylander*, the Court observed that the terms of the mortgage instrument itself provided the conditions under which power of sale arose. 270 Mich at 268-69. The *Reid* Court therefore looked to the mortgage terms to determine whether a trustee's foreclosure by advertisement was authorized. *Id.* at 269, 271. The Court decided that foreclosure was proper because the terms of the mortgage in that case allowed a trustee to take action when default occurred. *Id.* at 271. Therefore, only a proper invocation of the power of sale under the terms of the mortgage agreement could trigger the mortgagee's ability to effect foreclosure by advertisement, and a defect in notice of foreclosure renders the sale voidable. *Jackson Investment Corp v Pittsfield Products, Inc*, 162 Mich App 750, 755, 413 NW2d 99 (1987). The District Court erred in excluding the DeVries' evidence that the mortgagee failed to properly invoke the power of sale, and the Circuit Court erred in upholding the decision of the District Court.

***B. Failure To Properly Invoke The Power Of Sale Provisions  
Of The Mortgage Is A Defense To Eviction Following  
Attempted Foreclosure***

The plaintiff in a proceeding for possession of the premises has the burden to establish that he has the right to possession; the burden includes "evidence of compliance with every statutory provision relative to foreclosure by advertisement." *Reid v Rylander*, 270 Mich at 267.

The mortgage proceeding was flawed because the mortgagee did not have authority to proceed with foreclosure by advertisement in the first place. MCL 600.3204 establishes the circumstances under which a party may foreclose by advertisement. In relevant part, MCL 600.3204 (1) provides:

A party may foreclose by advertisement if all of the following circumstances exist:

- (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.

***Foreclosure by advertisement, which is what occurred in this case, therefore is not permitted under MCL 600.3204(1) until there is a valid power of sale.*** As noted in *Oades v Standard Savings & Loan Assn*, 257 Mich 469, 474, 241 NW 262 (1932)"[f]oreclosure by advertisement is by virtue of the power of sale in the mortgage. The power cannot be enlarged beyond its terms and the incorporated relevant statutes." See also *Reid v Rylander*, 270 Mich 263, 268-69; 258 NW 630 (1935) (examining the power of sale contained within a mortgage to determine whether foreclosure by advertisement was proper). The foreclosure on the DeVries' mortgage did not comply with MCL 600.3204 because the mortgagee did not properly invoke the power of sale that is contained within the mortgage agreement.

In summary, MCL 600.3204 (1) permits foreclosure by advertisement only when a valid power of sale has arisen. Foreclosure by advertisement can only arise "by virtue of the power of sale in the mortgage." *Oades v Standard Savings & Loan Assn*, 257 Mich at 474. Thus, if the power of sale is not properly invoked, the mortgagee has failed to meet a condition required to proceed with foreclosure by advertisement. Under *Reid*, a plaintiff seeking eviction under such circumstances is unable to establish that he has the right to possession of the subject property. *Id.* at 267. Therefore, failure to properly invoke the mortgage's power of sale is a defense to eviction following an attempted foreclosure.

***C. The Court of Appeals Properly Considered Evidence That  
The Power Of Sale Provisions Were Never Properly Invoked.***

Paragraph 14 of the mortgage specifies the procedure by which notice is to be communicated between the lender and the borrower, providing in relevant part:

Notice. Except for any notice required under applicable law to be given in another manner, (a) any notice to Borrower provided for in this Mortgage shall be given by mailing such notice by certified mail addressed to Borrower at the Property Address or at such other address as Borrower may designate by notice to Lender as provided herein . . . .

(Plaintiff's Ex. 2, p. 3) Contrary to this requirement, the mortgagee failed to give notice to the DeVries by certified mail; in fact, the DeVries never received *any* mailed notice.

(Answer to Complaint, p. 2, first affirmative defense) The previous mortgagor, Jack Poll, also did not receive any notice of the foreclosure. (Trial Tr., 11/25/02, pp. 97-98)

The procedures of Paragraph 14 are specifically incorporated by reference into the lender's acceleration provisions of Paragraph 18, which provides in pertinent part:

Acceleration; Remedies. Except as provided in paragraph 17 hereof, upon Borrower's breach of any covenant or agreement of Borrower in this Mortgage, including the covenants to pay when due any sums secured by

this Mortgage, Lender prior to acceleration shall mail notice to Borrower, *as provided in paragraph 14 hereof* specifying: (1) the breach; (2) the action required to cure such breach; (3) a date, not less than 30 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Mortgage and sale of the Property. *The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. . . .*

If Lender invokes the power of sale, *Lender shall mail a copy of a notice of sale to Borrower in the manner provided in paragraph 14 hereof. . . .*

(Emphases added) (A copy of the recorded mortgage is attached as Appendix C) Thus, if the lender had complied with the notice requirements of Paragraph 18, the DeVries would have had at least 30 days to pay the amounts due, before the lender could have accelerated payments and sold the property. Proper notice under Paragraph 18 also would have informed the DeVries of their right to bring an action to assert defenses to the lender's acceleration and sale. The right to reinstate the mortgage, referenced in Paragraph 18, is explicated in Paragraph 19, which allows for reinstatement by paying any arrearage and reasonable expenses incurred by the lender.

Contrary to the requirement of Paragraph 14 of the mortgage, the mortgagee failed to give notice to the DeVries by certified mail; in addition, the mortgagee also failed to give notice to the previous owner of the property. Because the acceleration provisions of Paragraph 18 explicitly depend upon proper notice being given in compliance with Paragraph 14, the mortgagee did not have the right to accelerate the mortgage payments and conduct the foreclosure sale. Neither the DeVries nor the previous owner received the contractually required notice (Answer to Complaint, p. 2, first affirmative defense; Trial Tr., 11/25/02, pp. 97-98); therefore, the power of sale

never arose. Accordingly, the District Court erred in not allowing a defense based on the mortgage provisions regarding the power of sale, and the Circuit Court erred in upholding the District Court's decision.

The irregularities in the foreclosure – by which the mortgagee foreclosed in spite of failing to comply with the requirements of MCL 600.3212 or to give the contractually required notice – and the DeVries' timely attempt at redemption, justify upholding the Court of Appeals ruling.

**III. Evidence that the DeVries Became the Mortgagors by Novation and by Actions of the Parties Was Admissible to Determine if Statutory Notice was Correctly Given.**

The Court of Appeals ruled that the District Court should have considered Defendants' evidence that the DeVries had assumed the mortgage and were entitled to be named as mortgagors in all statutory foreclosure notices. This defect in procedure, combined with the equitable issues of sale amount, windfall to the Plaintiff and the action taken to redeem, raised cognizable claims for setting aside the foreclosure sale, which the District Court erroneously refused to consider.

In the District Court proceeding, Defendants offered written evidence from the closing on their house purchase and assumption of Jack Poll's mortgage showing that a \$50 "mortgage transfer fee" had been assessed against the Defendants. The Defendants' offer of proof indicated they recalled paying this fee to the bank holding the mortgage, and recalled signing papers saying they were now the principals on the loan and mortgage, although this document could not be found 22 years later. Jack Poll testified that the bank had no contact with him after that. Nonetheless, the District Court would

not allow the evidence of novation to be presented, or allow the trier of fact to consider and decide whether the DeVries had become the mortgagors.

The notice of foreclosure, which did not mention the DeVries, failed to comply with the requirements of MCL 600.3212, which provides in relevant part:

Every notice of foreclosure by advertisement shall include all of the following:

- (a) The *names of the mortgagor*, the mortgagee, and the foreclosing assignee of a recorded assignment of the mortgage.

(Emphasis added) Section 600.3212 does not provide that only the original mortgagor must be notified. The plain meaning of MCL 600.3212(a) requires that the name of the mortgagor be listed on the notice of foreclosure. Regarding foreclosing mortgagees, MCL 600.3204(1)(c) requires that "a record chain of title exists evidencing the assignment of the mortgage to the party foreclosing the mortgage." However, there is no such parallel recording requirement for the assumption of a mortgagor's interest. Unlike the requirement that the names of assignees of recorded assignments be listed on the notice of foreclosure, the legislature did not state that a mortgagor's assumption must be recorded before requiring the name of the mortgagor to be listed on the notice of foreclosure.

If the DeVries had been permitted to introduce evidence that they were the current mortgagors at the time of foreclosure, and that their name was not on the notice of foreclosure, they would have been able to present a complete defense to Plaintiff's action for possession of the premises.

In applying the predecessor statute, the Michigan Supreme Court in *Oades v Standard Savings & Loan Assn* explained that "[w]hile slight and inconsequential



irregularities in the notice will not vitiate the sale, courts cannot disregard any of the positive provisions of the statute." 257 Mich 469, 472; 241 NW 262 (1932) (citation omitted). Regarding the policy underlying the statute, the Court observed that "[i]t is not for us to speculate upon whether the legislature intended the provision requiring the mortgagor to be named in the notice as affording a means of identifying the mortgage to prospective purchasers or as giving mortgagors constructive notice of foreclosure or otherwise. The provision is mandatory." *Id.* When the foreclosure proceedings fail to list the name of a mortgagor, the mortgagor is entitled to retain possession of the premises. *Id.* at 475. In the present case, the District Court therefore erred in its exclusion of evidence that the DeVries' had assumed Poll's mortgage, the Circuit Court erred in upholding the District Court's decision, and the Court of Appeals properly reversed.

Pine Oaks now erroneously contends that the Court of Appeals' decision is contradicted by Michigan Land Title Standards 16.22 , and that Example C is directly on point. However, Problem C in Standard 16.22 merely states that notice of foreclosure by advertisement is sufficient when "the grantees of the mortgagor, including the owner at the time of foreclosure, are not included in the published notice of sale." The DeVries were not merely Poll's grantees; rather, they offered evidence to establish that they had become the mortgagors by novation and assumption of the mortgage. Problem C in Standard 16.22 therefore does not address the situation that arose under the facts of the present case.

**IV. Once Cognizable Title Issues are Raised in a Summary Proceeding for Eviction, the District Court Must Either Decide Title for Purposes of**

**Determining Possession or Transfer the Matter to Circuit Court to Quiet Title.**

By order dated December 2, 2002 the District Court denied the DeVries' Motion to Amend their pleading to include a counter complaint. In the same order, the District Court denied the DeVries' Motion to Stay Proceedings or Remove them to Circuit Court. The cumulation of the District Court's evidentiary rulings, the denial of the motion to file a counter complaint, and the denial of the motion to transfer the case, deprived the DeVries of a proper forum for adjudication of their interest in the property vis a vis that of Plaintiff.

On page three of its decision, the Court of Appeals recognized that when a quiet title action is pending in Circuit Court, "possession cannot properly be granted via a summary proceeding [in District Court] when the claim to title is legitimately disputed." (Appendix A, attached) Plaintiff mischaracterizes that ruling as one saying that summary proceedings cannot be used to evict defendants; Plaintiff apparently ignores the limiting condition that the Court of Appeals placed on its ruling – that the case involve a situation where claim to title is legitimately disputed. Plaintiff further mischaracterizes the Court of Appeals decision as internally inconsistent. Page six of the Court of Appeals decision observes that the District Court had jurisdiction to consider the DeVries' equitable claims to determine whether summary proceedings for possession were the proper venue for resolution of the case, and that the District Court "could then have granted appropriate relief to permit resolution of the title claims, either by hearing the claims in district court or dismissing or staying the possession action until the title claims were resolved in circuit court." The Court of Appeals decision

consistently recognizes that where there is a legitimate title dispute, that dispute must be resolved before the possession action may be decided.

Under MCR 2.118(A)(2), after more than 14 days following service of an original pleading to which no answer is required, "a party may amend a pleading only by leave of the court or by written consent of the adverse party. *Leave shall be freely given when justice so requires.*" (Emphasis added) See also *Weymers v Khera*, 454 Mich 639, 658-659; 63 NW2d 647 (1997), *Phinney v Verbrugge*, 222 Mich App 513, 522-23; 564 NW2d 532 (1997).

"If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision." *Weymers*, 454 Mich at 659. The District Court denied the DeVries' Motion to add a counter complaint, indicating only that it had reviewed matters and listened to the arguments made by counsel for both sides:

THE COURT: All right. I am going to, at this point, after reviewing the matters and listening to the arguments, I'm going to deny the right to add the – or the addition of the counter-claim, and as we've discussed in chambers, you can file your motion and we'll see what the Circuit Court has to say.

(Motion Hearing Tr., 11/11/02, p. 28) In opposing the DeVries' motion, Plaintiff's counsel indicated that third parties would have to be brought into the case in order to quiet title, and that such proceedings would delay resolution of Plaintiff's interest in the case. (Motion hearing Tr., 11/11/02, p. 22-23) Counsel for the DeVries' noted, however, that the District Court could proceed with ruling on such an action as it applied between Plaintiff and the DeVries only. (Motion hearing Tr., 11/11/02, p. 23-24) Thus, Plaintiff

did not show that allowing the DeVries to amend their answer to include a counter complaint would result in the sort of prejudice discussed in *Weymers*, 454 Mich at 659, *Phinney*, 222 Mich App at 522-23, or *Jager v Nationwide Truck Brokers, Inc*, 252 Mich.App. 464, 488, 652 N.W.2d 503 (2002).<sup>2</sup>

MCR 4.002 generally governs transfer of actions from District Court to Circuit Court. MCR 4.002(A) provides that:

- (1) If a defendant asserts a counterclaim or cross-claim seeking relief of an amount or nature beyond the jurisdiction or power of the district court in which the action is pending, and accompanies the notice of the claim with an affidavit stating that the defendant is justly entitled to the relief demanded, the clerk shall record the pleading and affidavit and present them to the judge to whom the action is assigned. The judge shall either order the action transferred to the circuit court to which appeal of the action would ordinarily lie or inform the defendant that transfer will not be ordered without a motion and notice to the other parties.
- (2) MCR 4.201(G)(2) and 4.202(I)(4) govern transfer of summary proceedings to recover possession of premises.

Thus, when the District Court does not have jurisdiction over a counterclaim, it may transfer a case to Circuit Court. MCR 4.201 generally governs summary proceedings to recover possession of premises. MCR 4.201(G)(1)(a) provides in relevant part that,

A party may join:

- (ii) A claim or counterclaim for equitable relief.

MCR 4.201(G)(2) provides for removal of counterclaims under limited circumstances:

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<sup>2</sup> In arguing that the counter complaint should not be allowed, Plaintiff's counsel asserted that the DeVries' quit claim of their property to Enterprise Mortgage (as part of the DeVries' attempt to redeem the property) resulted in the DeVries not having any interest in the property at all. (Motion hearing Tr., 11/11/02, p. 22) However, execution of a quitclaim deed and a contract to repurchase the land – as occurred between the DeVries and Enterprise Mortgage – constitutes a loan secured by a mortgage, especially in light of the minimal consideration tendered by Enterprise for the mortgage. *Ellis v Wayne Real Estate Co*, 357 Mich 115, 119-20; 97 NW2d 758 (1959)

- (a) A summary proceedings action need not be removed from the court in which it is filed because an equitable defense or counterclaim is interposed.
- (b) If a money claim or counterclaim exceeding the court's jurisdiction is introduced, the court, on motion of either party or on its own initiative, shall order removal of that portion of the action to the circuit court, if the money claim or counterclaim is sufficiently shown to exceed the court's jurisdictional limit.

The District Court's decision on whether to transfer a case to Circuit Court under MCR 4.002 is reviewed for abuse of discretion. *Hopp Management Co v Rooks*, 189 Mich App 310, 313; 472 NW2d 75 (1991) (reviewing decision on a motion for transfer under MCR 4.002(B)).

The District Court denied the motion to transfer the case to Circuit Court, stating as its basis, "[i]t's a separate action." (Motion Hearing Tr., 11/11/02, p. 19) While the court did not more specifically indicate the basis for its ruling, counsel for Plaintiff had argued that his client did not want the resolution of the case to be delayed by proceedings in the Circuit Court. (Motion Hearing Tr., 11/11/02, pp. 16-17)

Taken together, the District Court's rulings denied the DeVries an opportunity for proper adjudication of their interest in the property vis a vis that of Plaintiff.<sup>3</sup> As stated above, the District Court refused to allow consideration of evidence that the DeVries had become mortgagors of the subject property and that the power of sale never arose under the terms of the mortgage, thus depriving the DeVries of a proper defense to eviction. Arguing in favor of allowing amendment to include a counter complaint, counsel for the

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<sup>3</sup> By contrast, in the unpublished case of *Cannoy v Interstate Builders, Inc*, the District Court matter was forestalled to allow Plaintiffs to pursue remedies in the Circuit Court. 2003 WL 133063 (Mich App January 3, 2003) (Appendix D, attached). The Court of Appeals noted that typical mortgagors are unable to defend against claims to their property until after eviction proceedings have begun. *Id.* (Holding that the Cannoy's

DeVries noted that bringing the counter claim was compulsory, because of the possibility of an inconsistent and contradictory result to the quiet title action pending in the Circuit Court. (Motion Hearing Tr., 11/11/02, p. 24) If the Circuit Court quieted title in the DeVries, the result would be inconsistent with a District Court judgment that Plaintiff is entitled to possession of the property. This view is supported by the decision in *Sewell v Clean Cut Management, Inc*, where – clarifying the doctrine of res judicata – the Court stated that "where the district court judgment and writ have not been reversed or vacated, they are conclusive on the narrow issue whether the eviction was proper." 463 Mich 569, 576; 621 NW2d 222 (2001).

As noted in *Hollins v City of Detroit Police Dept*, however, statutes and court rules are not to be read in such a way as to deprive a party of a forum to seek relief. 225 Mich App 341, 347; 571 NW2d 729 (1997). Thus, the Court in *Hollins* held that the trial court had jurisdictional authority to order return of seized property to the mother of someone who possessed 650 grams of cocaine, because the government failed to serve notice of forfeiture upon the mother. *Id.* at 343, 347. Similarly, in the present case, proper notice was not served upon the DeVries. By deciding the eviction action without allowing the previously-noted defenses to eviction, in conjunction with denying the motion to add a counter complaint and denying the motion to transfer the case to the Circuit Court, the District Court improperly denied the DeVries a forum for determination of whether the eviction was proper.

The Circuit Court opinion contended that the District Court could not have allowed a counterclaim or granted a motion to transfer the case for consolidation with

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pursuit of remedies in Circuit Court was not barred by laches, citing *Manufacturers Hanover*, 142 Mich App at 553-54.)

the Circuit Court action because MCR 4.201(J)(1) requires summary proceedings in District Court to take place within 56 days after the initial hearing. However, that Court Rule does not apply to Circuit Court proceedings, and thus would not have prevented transfer of the case for a fair and complete adjudication of rights in the disputed property, pursuant to MCR 4.002(A). There is no authority indicating that such a transfer from District Court to Circuit Court would constitute a violation of MCR 4.201(J)(1). Therefore, the Court of Appeals properly noted that the District Court should either have decided the issue of title or transferred the matter to the Circuit Court.

### CONCLUSION

The District and Circuit Court decisions were based on a narrow view of the available bases for challenging non-judicial foreclosures in subsequent eviction proceedings.

- The trial court refused to allow an examination of whether the foreclosure was properly brought under the contract's power of sale clause. The lower courts limited any review to the few statutory procedures involved, despite prior court rulings that made clear that the statutory procedures were invoked and thus reviewable precisely **because** they were incorporated in the contractual provisions for acceleration and sale.

- The trial court refused to allow any evidence of an explicit agreement to replace the original mortgagor with defendants, or any evidence of many years of treatment of the defendants as the mortgagors, deeming it irrelevant to whether the proper party was named in foreclosure notice. The Circuit Court upheld this ruling based on the failure to lay a foundation for evidence of the explicit novation, despite

an offer of proof by defendants that documents were subject to subpoena but could not be found.

- The trial court would not allow any evidence of the tremendous disparity between the value of the house and the foreclosure sale price, despite the essentially equitable nature of the relief sought by the foreclosure sale purchaser, who stands to make a windfall by completing this eviction.

- Finally, the trial court's rulings boxed in the defendants, not allowing a full review of the validity of the foreclosure in district court and not consolidating the case with the Circuit Court action where this would clearly be possible. This application of the rules left no forum where justice could be done.

The reality of foreclosures by advertisement is that the eviction procedure is the first - and likely the only - time that the foreclosure process is reviewed by a court. For all of the reasons presented above, this Court should deny Pine Oaks' application for leave to appeal from the decision of the Court of Appeals, whose ruling allows Appellants a fair chance - previously denied in the lower courts - to retain the significant equity that they have in their home.

Respectfully Submitted:



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